

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
To: The Commission		

OPPOSITION TO PETITION FOR RECONSIDERATION

Nextel Partners, Inc. (“Nextel Partners”), by undersigned counsel and pursuant to section 1.429(f) of the Commission’s rules, 47 C.F.R. § 1.429(f), as well as the Notice published July 20, 2005 in the Federal Register,¹ hereby files this Opposition to the Petition for Reconsideration (the “Petition”) filed on June 24, 2005 on behalf of the Independent Telephone and Telecommunications Alliance (“ITTA”), the Western Telecommunications Alliance (“WTA”), and TDS Telecommunications (“TDS”) (hereafter jointly referred to as the “Wireline Petitioners”), in which the Wireline Petitioners ask the Commission to reconsider its recent Report and Order establishing the framework for designation of eligible telecommunications carriers (“ETCs”).²

I. INTRODUCTION

The Wireline Petitioners recommend changes to the *Report and Order* that would make it more difficult for wireless carriers to become designated as ETCs. While these changes are put forth ostensibly to “protect” the integrity of the Universal Service Fund

¹ See “Petition for Reconsideration of Action in Rulemaking Proceeding,” 70 FR 41756 (July 20, 2005).

² *Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd. 6371 (2005) (hereafter, “*Report and Order*”).

(“USF” or “Fund”), the broad denial of designation to competitive ETCs (“CETCs”) is neither the appropriate method for protecting the Fund nor for fulfilling Congress’ goals underlying the Universal Service support mechanisms. In any designation decision, the needs and interests of citizens for access to telecommunications services, including mobile telecommunications services, must be paramount. While promulgating regulatory impediments to wireless ETC designation could effectively limit the amount of competition faced by incumbent wireline ETCs, such changes would be contrary to the public interest goal of ensuring that all citizens have access to the same array of telecommunications services. Mobile wireless telecommunications services have become a way of life in urban centers and use of USF support to bring these same services to all citizens of the nation is fully in accord with, and indeed mandated by, Sections 254 (b) and 214 of the Communications Act, 47 U.S.C. §§ 254(b) & 214. Accordingly, the Commission should reject the changes to the *Report and Order* suggested by the Wireline Petitioners.

II. REQUIRING UBIQUITOUS SERVICE PRIOR TO DESIGNATION WOULD BE CONTRARY TO THE ACT AND CASE PRECEDENT

The Wireline Petitioners contend that the *Report and Order* runs afoul of section 214(e) of the Act, 47 U.S.C. § 214(e), insofar as it does not require a carrier seeking to be designated as an ETC to demonstrate that it provides ubiquitous coverage throughout the subject service territory as a precondition to designation.³ The Wireline Petitioners’ contention is contrary to the articulated goals of the Act and established case precedent and therefore should be rejected.

³ Petition at 3-6.

The express purpose of the Act is to “make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges.”⁴ Congress created the USF so help ensure that *all people of the United States* would have access to the same types of telecommunications services at reasonably comparable rates. Thus, Congress stated in section 254 of the Act,

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.⁵

It is well established that a primary purpose of the USF is to promote the *growth* of telecommunications services in high cost areas. As the Commission has observed,

We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support.⁶

Accordingly, the Commission has held that a ubiquitous service requirement as a precondition to designation would be contrary to the Act:

⁴ 47 U.S.C. § 151.

⁵ 47 U.S.C. § 254(b)(3).

⁶ See *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd. 15168, ¶ 13 (2002) (“*South Dakota Declaratory Ruling*”).

We believe that interpreting section 214(e)(1) to require the provision of service throughout the service areas prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service in violation of section 253(a) of the Act ... that such an interpretation ... is not competitively neutral ... [and] that to require the provision of service throughout the service area prior to designation effectively precludes designation of new entrants as ETCs in violation of the intent of Congress.⁷

The Wireline Petitioners have introduced nothing that might justify revisiting this matter. The only argument proffered by the Wireline Petitioners is that the “plain language” of section 214(e)(1) of the Act requires designated ETCs to offer and advertise supported services “throughout the service area for which the designation is received.”⁸ This plain language argument is unpersuasive and was rejected by the Commission years ago—simply put, the requirement of offering service upon reasonable request and advertising service *after* designation is not the same as a requirement that ubiquitous service be provided *prior to* designation.⁹

Importantly, ETC designation only allows a CETC to become *eligible to receive* USF support; unlike an incumbent ETC, a CETC does not receive any support until it provides service to customers. Moreover, unlike an incumbent ETC, a CETC receives support only on a per-line basis for those customers to whom it provides service. To the extent that a newly designated CETC does not yet provide service to customers in any particular part of its designated area, then it receives no support for that portion of its territory. Thus, there is no merit to the Wireline Petitioners’ contention that the *Report*

⁷ *South Dakota Declaratory Ruling* at ¶ 2.

⁸ Petition at 3-4, quoting 47 U.S.C. § 214(e)(1).

⁹ See *South Dakota Declaratory Ruling* at ¶ 14 (“Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall “offer” and advertise its services. The language of the statute does not require the actual provision of service prior to designation.”)

and Order “allow[s] CETCs to recover support for the high-cost, difficult-to-reach customers within their designated service areas while simultaneously avoiding any obligation to serve them.”¹⁰ Only by providing service to a customer can a CETC receive support for that customer.¹¹ Accordingly, there is no basis for imposing the ubiquitous service requirement proffered by the Wireline Petitioners as a prerequisite for ETC designation, and the Commission should deny the Petition.

III. THE REPORT AND ORDER ALLOWS FOR APPROPRIATE CONSIDERATION OF THE IMPACT OF ETC DESIGNATIONS ON THE SIZE OF THE FUND

The Wireline Petitioners contend that the Commission has failed to adopt criteria for ETC designation that allow for consideration of the effect of designations on the size of the USF, and therefore the Commission has failed to meet its public interest mandate.¹² This contention is not supportable, particularly as the Commission *did* adopt criteria in the *Report and Order* that allow for balanced consideration of the amount of support to be received as part of the designation process. As the Commission stated, “We find that per-line support received by the incumbent LEC should be one of many considerations in our ETC designation analysis.”¹³ The Commission stated further that, “We believe that states making public interest determinations may properly consider the level of federal

¹⁰ Petition at 6.

¹¹ While it is theoretically possible that an incumbent’s cost of providing service to a handful of difficult-to-reach customers is so high in comparison to the incumbent’s cost of providing service to other customers within the service area that the per-line support amount paid throughout the entire area could become inflated by an amount that may be significant, the scenario is unlikely. If this does occur, however, and the incumbent ETC within the study area believes that a CETC receives some undue advantage or benefit as a result, the incumbent is free to seek disaggregation of the study area. The possibility of this scenario, however, is not a valid basis for wholesale denial of designation of CETCs.

¹² See Petition at 7.

¹³ *Report and Order* at ¶ 55.

high-cost per-line support to be received by ETCs.”¹⁴ Thus, the *Report and Order* allows for consideration of costs to be borne by the Fund as part of the ETC designation process.

The Wireline Petitioners contend nonetheless that the *Report and Order* does not go far enough, as it does not address the “impact on the Fund by the *aggregate* designation of CETCs.”¹⁵ Managing the aggregate impact of ETC designations is a matter more appropriately considered in other ongoing proceedings such as the *Rural Referral Proceeding*,¹⁶ which is addressing how support is calculated for both incumbent and competitive ETCs. Considering the aggregate impact of *all* ETC designations would not be appropriate as part of the criteria for evaluating any particular petition for designation.

In fact, the three options offered by the Wireline Petitioners towards this end under the guise of protecting the Fund—(1) adoption of per-line benchmarks; (2) cap on the number of CETCs; and (3) denying designation to wireless petitioners that would receive Interstate Common Line Support (ICLS)¹⁷—are aimed exclusively in restricting the designation of wireless ETCs and in that sense are transparently anticompetitive. Notably, the Wireline Petitioners are silent as to other possible options that have been put forth in the *Rural Referral Proceeding*, e.g., capping the amount of support provided to

¹⁴ *Id.*

¹⁵ Petition at 9 (emphasis added).

¹⁶ *See Federal-State Joint Board on Universal Service*, Order, 19 FCC Rcd. 11538 (2004).

¹⁷ The contention of the Wireline Petitioners that designating wireless ETCs in areas where ICLS is paid to the incumbent ETC “essentially provid[es] wireless carriers with money for nothing” is invalid. (*See* Petition at 12.) Insofar as ICLS is part of the Universal Service program, the same rules applicable to other forms of support must apply.

incumbent ETCs, or moving away from the embedded cost methodology used for computing payments to rural ETCs and adopting instead a forward-looking cost model.

In sum, it would be contrary to the goals of Congress to adopt criteria for ETC designation that would give an incumbent carrier a competitive advantage over would-be market entrants by limiting support to CETCs under the guise of protecting against aggregate Fund growth. The notion that the USF would increase in size dramatically if all carriers everywhere were designated as ETCs is not validly a part of the criteria for assessing whether any particular ETC should be designated. The problem of aggregate Fund growth is best addressed in other proceedings that have been started specifically for that purpose, and not as part of the criteria for designation.¹⁸

IV. STATES HAVE NOT BEEN TOO LENIENT IN DESIGNATING CETCs

While the *Report and Order* encourages states to adopt designation criteria similar to those adopted by the FCC, it does not mandate states to follow these criteria. The Wireline Petitioners contend that the FCC should require states to implement these criteria as a minimum standard for designation, asserting that states are too lenient in designating CETCs. Specifically, the Wireline Petitioners state, “Past experience suggests that some state commissions need more than just ‘encouragement’ to apply rigorous standards for ETC designation. Some states seem to view the Fund as a source of additional federal funding that should be maximized whenever possible.”¹⁹ The Wireline Petitioners do not name any states specifically, however it appears that they

¹⁸ This is particularly true given that the many disparate comments in the *Rural Referral Proceeding* reveal that there is so little consensus on how to address the issue, and it appears that re-constituting a Rural Task Force to develop a consensus proposal is likely the best option for proceeding.

¹⁹ Petition at 13.

believe states are designating too many wireless CETCs. As noted above, it is not appropriate to use the ETC designation process as a means to limit competition from wireless ETCs.

Although promulgating minimum mandatory criteria for the states to implement is not warranted, some additional guidance to the states is needed. As Nextel Partners explained in its Petition for Reconsideration and Clarification submitted in this proceeding,²⁰ the Commission should clarify that while states may institute their own designation criteria and processes, states may not implement factors or processes that stand in the way of achieving the Congressional goals of promoting the availability of universal service, including mobile telecommunications services, for all citizens. A state regulation or action that disadvantages or otherwise inhibits wireless ETCs would be contrary to the goals of Universal Service, and would be preempted under the Act. The Commission should therefore clarify that a state's public interest analysis must take place within the Congressional framework seeking to establish equivalent services for all citizens.

²⁰ *Federal-State Joint Board on Universal Service*, Petition for Reconsideration and Clarification of Nextel Partners, Inc. (filed June 24, 2005), at 5-9.

V. CONCLUSION

For the reasons set forth above, the Commission should deny the Petition.

Respectfully submitted,

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Dated: August 4, 2005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
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